IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1911.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellant.
v.
THE F. W. COOK BREWING COMPANY,
Appellee.

No. 64

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLEE.

GEORGE A. CUNNINGHAM,
Attorney for Appellee.

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STATEMENT OF THE CASE.

As very fully stated in appellant's brief this suit was originally brought in the Vanderburgh Circuit Court in the State of Indiana by the appellee to restrain the appellant from refusing to accept shipments

of beer tendered by the appellee to the appellant at Evansville, Indiana, and intended for shipment to appellee's customers at so-called local option points in the State of Kentucky.

The statement of the case made by counsel for appellant is substantially correct. It does not make quite plain, however, the fact that the purpose of the complaint was to compel the appellant to accept shipments of beer consigned to appellant's customers generally in local option counties in the State of Kentucky. Indeed we think counsel's statement of the case slightly misleading in this that it would make it appear that the shipments of beer sought to be enforced by the appellee upon the appellant were to persons who expected to sell the same in the State of Kentucky in contravention of the laws of that State, thus placing the appellee in the attitude of making it possible for some one in the State of Kentucky to violate the law, while the appellant claims that it is pursuing a course intended to prevent violations thereof. While it is true, as suggested in appellant's brief, that the shipments of beer especially mentioned in the complaint were to persons having unexpired licenses, still the allegations of the complaint, the averments of the answer, and the restraining order issued are broad enough to cover all shipments of beer intended to be made by the appellee to its customers in local option districts in the State of Kentucky, whether dealers in beer or not.

A reference to the prayer for relief contained in the complaint, which appears at the bottom of page 5 of the record, is sufficient to show that the few shipments intended for persons having unexpired licenses, were mere incidents of the general relief prayed for, which was that the appellant be restrained from refusing to accept shipments of beer destined to local option or other points on its line of railway in the State of Kentucky.

It is not claimed, as we understand it, that there is any law or policy of the State of Kentucky that prohibits any of its citizens from using beer or evens tronger liquor. Whether or not, however, this be the case, there is and can be no law or policy in force in the State of Kentucky that will prevent a citizen of another state from shipping to a citizen of the State of Kentucky beer or other intoxicating liquor so long as interstate commerce is under the protection of the federal government.

With these suggestions, for the present at least, the statement of facts of the case as made by counsel for appellant, may be accepted as substantially correct.

BRIEF OF ARGUMENT.

Stating the case briefly, the Vanderburgh Circuit Court, by mandatory injunction, required the appellant to accept all shipments of beer tendered by the appellee and accompanied by tender of proper freight charges consigned to its customers generally in so-called local option districts in the State of Kentucky. The case was removed to the Circuit Court of the United States for the district of Indiana, which court not only declined to dissolve the temporary restraining order, but on final submission of the cause made the same permanent. An appeal having been taken to the Circuit Court of Appeals for the Seventh Circuit, that court affirmed the judgment of the Circuit Court.

L. & N. Railroad Co., v. F. W. Cook Brewing Co., 172 Fed. Rep. 117.

DOES AN APPEAL LIE TO THIS COURT IN THIS CAUSE?

Counsel for the appellant in their brief, page 44, assume that an appeal lies from the decision of the Circuit Court of Appeals to this court under Section 6 of the Act of March 3, 1891.

26 Stat. at L. 828.

This section, after providing for the appellate jurisdiction of the Circuit Court of Appeals, provides as follows:

> "And the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states."

Counsel seek to escape the effect of this language by the claim that this case arises under the constitu-

tion and laws of the United States. "Which fact," (we quote from appellant's brief, page 44) "appears from the appellee's statement of its case in the state court, as well as in appellant's petition for removal, and the matter in controversy as averred in appellant's said petition, exceeds $1,000.00, besides costs."

It is true that the appellant's petition for the removal of this cause from the state to the federal court does aver that, "this suit arises under the constitution and laws of the United States, and especially under an act to regulate commerce, passed by the Congress of the United States on the 4th day of February, 1887, and amended by an act of said Congress passed on the 29th day of June, 1906."

Transcript page 10.

It is to be observed, however, that the real ground upon which the appellant sought and obtained the removal was diversity of citizenship.

The appellee submits, therefore, that this suit does not arise under the interstate commerce act as we think will be apparent from the authorities hereafter referred to in discussing the merits of the controversy, that it does not arise under the constitution and laws of the United States as contended in appellant's brief and that under the decisions of this court the appeal should be dismissed.

Empire State-Idaho M. & D. Co., et al, v. Hanley, 198 U. S. 292, 49 L. Ed. 1056.

Arbuckle et al v. Blackburn, 191 U. S. 405, 48 L. Ed. 239.

Spencer v. Duplan Silk Co., 191 U. S. 526, 48 L. Ed. 287.

Bonin v. Gulf Co., 198 U. S., 115, 49 L. Ed. 970.

Bankers' Mut. Casualty Co. v. Railway Co., 192 U. S., 371, L. Ed. 484.

Cochran v. Montgomery County, 199 U. S. 260, 50 L. Ed. 182.

Chapman v. Brown, 207 U. S. 88, 52 L. Ed. 116.

Empire State-Idaho M. & D. Co., v. Hanley, 205 U. S. 225, 51 L. Ed. 779.

Weir v. Rountree, 216 U. S. 603, 54 L. Ed. 635.

St. L. R. C. & C. R. Co., v. Wabash Co., 217 U. S. 247, 54 L. Ed. 752.

Bagley v. General Fire Ex. Co., 212 U. S. 477, 53 L. Ed. 605.

Should the court be of opinion that an appeal lies, the appellee submits most earnestly that the judgment of the court below was correct and should be affirmed for the following reasons:

Without noticing in detail the errors assigned, it is sufficient to state that they depend upon the correctness on several propositions of law asserted by the appellant, and of these in their order:

I.

First: It is insisted that the Vanderburgh Circuit Court had no jurisdiction of the subject matter of the action. This want of jurisdiction is predicated upon two propositions:

(1) That the remedies sought to be enforced are derived from the Interstate Commerce act and can only be enforced in the manner provided therein; and

(2) That the subject matter of the action was not within the jurisdiction of the Vanderburgh Circuit Court in this, that the order sought to affect property and the rights of parties beyond the territorial jurisdiction of the State of Indiana.

In support of the first proposition appellant's brief refers with some detail to the provisions of the Inter-

state Commerce Act and the conclusion sought to be deduced is that the rights of the appellee depend upon that act and must be enforced according to the provisions thereof.

It is claimed that the appellee must rely on Section 3 of the Act of June 29, 1906, which is as follows:

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Certainly it will not be contended that prior to the enactment of this section a shipper had no right by mandatory injunction to compel a common carrier to accept his goods upon offering to pay the reasonable transportation charges. If the position of the appellant is correct then in substantial effect all courts other than those designated by the Interstate Commerce Act are deprived of jurisdiction to enforce the rights of shippers. In view of the well-known purposes of the act and the history connected with its adoption and enforcement it cannot be necessary to combat this statement. To suppose for a moment that it was intended to curtail or diminish in any way the rights the shipping public already had would be to do violence to the well-known purpose of congress to provide additional rights and safeguards for the protection of their interests.

Counsel for appellant proceed to argue that the appellee should have proceeded under Section 9 of the Act and made its complaint to the Commission or

brought suit for damages in any District or Circuit Court of the United States having jurisdiction, or that it should have pursued one of the other methods provided for by the Act, all of which would have involved great delay and inconvenience.

We do not believe appellant's position on this point will commend itself for a moment to the favorable consideration of the court. However, the Act itself makes it plain that it was not intended thereby to take away any existing remedies. It is provided in Section 22 as follows:

> "Nothing in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

In a few lines counsel for appellant seek to dispose of this provision by the adroit suggestion that the remedy by injunction is neither a common law nor a statutory remedy, and that, therefore, it was not within the saving clause of the statute. No reason is given or suggested why congress, careful as it was to preserve all existing remedies, should deprive the shipper of the one frequently most prompt and efficient. To give the language, the meaning contended for would be a striking example of what lawyers sometimes refer to as "sticking in the bark." But appellant's contention is supported neither by reason nor authority. The term "common law," especially as distinguished from the written or statutory law, has a well-defined meaning. We quote from the first volume of Kent's Commentaries, page 533, as follows:

> "The common law includes those principles, usages and rules of action applicable to the government and security or person and property which do not rest for their authority upon any express and positive declaration of the will of the legislature."

It was, of course, in this broad and general sense that the term was used by Congress.

A number of cases are cited which it is claimed sustain the contention that the remedies provided by the Interstate Commerce Act are exclusive. It is submitted that an examination of these cases will show clearly that the remedies provided by the Act are exclusive only when it is sought to enforce some provision of the Act itself, and not when it is sought to enforce a right theretofore existing either at common law or by statute, unless the enforcement of such right is by the act committed to some other tribunal.

For instance, in the case of the *Central Stock Yards Co. v. L. & N. R. R. Co.*, 112 Fed. Rep. 823, it was sought by the complainant, the Central Stock Yards Company, to compel the L. & N. R. R. Company to bill certain shipments of cattle to a point other than its regular live stock depot at Louisville. Inasmuch as there was such physical connection with the tracks of the L. & N. as would have made the delivery at the place proposed by the complainant possible it was contended that, under the Interstate Commerce Act, the L. & N. was required to make the connection and delivery proposed. Really all that was decided in this case was a denial of the preliminary injunction sought; but the following language of the court on page 826, makes it perfectly clear that the complainant was seeking to enforce a right created by the Act:

> "It will thus appear that congress has not only created a new right by Section 3 of the Act—a right which did not exist at common law nor by any previous congressional enactment—but has also by the same Act expressly provided remedies to protect and enforce that right by Sections 8 and 9. Are not those remedies thus provided exclusive of all others? The court is strongly inclined to be-

lieve that this question must be answered in the affirmative upon the very explicit language found in the opinions in the following cases," citing a number of authorities.

The case of *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, is also cited in support of this contention. In that case the railroad company had complied with the Interstate Commerce Act in establishing, publishing and filing with the Commission a schedule of rates. The shipper conceived that this schedule in the particular case involved was unjust, and instead of appealing to the commission, paid the freight and sued to recover what it conceived to be the unreasonable excess. The result of the court's reasoning was to the effect that to permit the shipper to maintain such an action would be to permit the question of the reasonableness of the rate to be determined by two entirely different tribunals which might reach entirely different results, and that such a procedure would in effect nullify that part of the Act. In other words, the question of fixing reasonable rates is a matter committed exclusively to the Interstate Commerce commission, and when the carrier has complied with the Act concerning the schedule of rates they can only be attacked in the manner provided for in the Act. Of course no such question arises in the case at bar. It is not a question of rates at all. The carrier simply declined, for the reasons given in its answer, to accept the shipper's merchandise. These reasons were not based in any respect upon any matters committed by the Act to the jurisdiction of the Commission.

To adopt appellant's view would be equivalent to saying that a shipper cannot go into court to redress any sort of grievance, but must apply in the first instance to the commission. Such was not the purpose of the Act and in this connection the language of the

Supreme Court in the case just cited is material. We quote thereform, page 437, as follows:

> "The Act made it the duty of the carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing a public schedule of such rates. It forbade all unjust preference and discriminations; made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the Act," etc.

It is pertinent to note the language of the court on page 446, in reference to the saving clause in Section 22 of the Act above quoted. The court held that this saving clause could not avail the shipper for the reason that to give it this effect would be to nullify a part of the Act itself. It was held that to permit the shipper to settle the question of the reasonableness of the rate in the state court was absolutely inconsistent with the Interstate Commerce Act, which vested the determination of this matter in the Commission. No suggestion is made that the enforcement of the appellee's rights in this action will in any sense impair any of the provisions of the Act by or any possibility come in conflict with any decision the Commission may ever make. Indeed, it was never for a moment supposed that any such question as the one involved here would be brought before the Commsision for determination.

As above observed, the Interstate Commerce Act was intended to provide for just, reasonable and uniform rates and was not intended to supersede or take the place of other existing remedies, except where the enforcement of such remedies would have the effect of nullifying the Act itself by vesting the determination of questions arising thereunder in tribunals other than those named in the Act. True, it is shown by the record that appellant's circular announcing that there-

after it would decline to accept shipments of intoxicating liquors consigned to local option points in Kentucky, was filed with the Interstate Commerce Commission. It is hardly necessary to say that this amounted to nothing for the reason that there was no law authorizing it so to do. The Interstate Commerce Act takes no notice of the question of prohibition or local option. Furthermore, the only schedule required to be filed is a schedule of rates and an examination of the schedule referred to will show that it simply sets out an Act of the legislature of the Commonwealth of Kentucky, and names certain points in that state to which it would decline to ship intoxicating liquors. There is no provision in the Act requiring, or even permitting, any such statement or declaration to be filed, and it therefore derives absolutely no virtue from the fact of having been so filed.

But this exact question has been decided adversely to appellant's position in *Danciger et al v. Wells-Fargo & Co.*, 154 Fed. Rep. 379. This was an action for a mandatory injunction to require the defendant to carry intoxicating liquor from Kansas City, Missouri, to various parts of the country. The following language of the court shows not only the contention there made by the carrier, but the ruling of the court thereon:

> "A further contention made by the defendants is that the court of exclusive original jurisdiction in this controversy is the Interstate Commerce Commission and that this court has no jurisdiction in the first instance to afford to complainants the relief here sought; and much reliance is placed by the defendants on the case of *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct., 350, 51 L. Ed. 553. From a reading of that case I do not consider it applicable to the state of facts here presented. If the controversy here was as to

whether the defendants were charging excessive or unreasonable rates for the shipments tendered by complainants, the case relied upon would, to my mind, be in point; but as the ground of relief sought by complainants in the case at bar is the performance by defendants of a duty imposed upon them by law, which they wholly neglect and refuse to perform, I think such question is one for the determination of the courts."

Appellee submits, therefore, that the contention that it must have applied first to the Interstate Commerce Commission or to some court therein designated is absolutely without support in law.

Had the Vanderburgh Circuit Court jurisdiction of the subject matter and of the parties so that it was authorized to issue a temporary restraining order? The appellant's argument is that because it was directed by the court in Indiana to receive and ship beer, billed at that point and destined for points in Kentucky, therefore, the Indiana court sought to affect persons and property beyond its jurisdiction. Where, then, was the appellee to bring its proceeding? Had it gone to Kentucky the officers and agents of the corporation there could have truly answered that they could not be compelled to accept shipments of beer in Indiana. There is no tribunal with jurisdiction broad enough to reach the persons and property in both states. Therefore, the shipper is wholly without remedy. Certainly no such reproach will be cast upon the law. No one will question the correctness of the general principles announced by the authorities cited by appellant to the effect that generally speaking the courts of one state can issue no process affecting persons or property in another state. It is not necessary, however, to cite authorities upon the elementary proposition, that where the courts of one state have jurisdiction of the

parties it may in certain instances affect the title to property situate in another. Of course, it can do this only by operating upon the persons within its jurisdiction and punishment for contempt for disobedience of the order of court is possibly the only final process that can be made effective. There is no denial of the proposition that the Vanderburgh Circuit Court had jurisdiction over the person of the appellant. No question was made as to the regularity of service and it appeared by counsel and asked for the removal of the cause to the Circuit Court of the United States for the District of Indiana. At no time, as shown by the record, has there been any suggestion that the defendant was not properly in court. It is well settled that where a court has jurisdiction of the parties, especially in cases of injunction and specific performance, it will grant relief, even though the property to be affected is in another state. Even proceedings in the courts of one state may be enjoined by courts of another state where the latter have jurisdiction of the parties.

I High on Injunctions, Fourth Edition, Sections 103, *et seq.* 6 Pomeroy's Equity Jurisprudence, Section 670.

Eingartner v. Illinois Steel Co., 59 Am. St. Rep. 859, note.

Hawkins v. Ireland, 58 Am. St. Rep. 534, note.

Hayden v. Yale, 40 Am. St. Rep. 232.

But in the case at bar both the persons and the subject matter of the cause of action were within the jurisdiction of the court. It is not denied that the L. & N. Railroad Company has one of its intermediate *termini* at Evansville, or that it was properly brought into court in accordance with the practice in the State of Indiana. That the appellee had its place of business in Evansville, Indiana, and proposed to make the shipments of beer from that point is not denied. The court

had as complete jurisdiction of both the persons and the subject matter of the action as it could be possible for a court to have in any case of this nature. The mere fact that the delivery of the goods may have involved the performance of some duty by some employee of the appellant beyond the jurisdiction of the court cannot defeat the appellee's right to an injunction. Were the law otherwise it would never be possible to compel a carrier by mandatory injunction to receive and deliver goods. It could always escape upon the ground that the carriage and delivery would involve the performance of a duty by some one not before the court. This right was fully asserted in the case of the *C. B. & Q. Ry. Co. v. B. C. R. & N. Ry. Co. et al.*, 34 Fed. Rep. 481. The fact that the duty of the defendant company in that case was imposed by the statutes of Iowa as well as by the Interstate Commerce Act does not lessen the effect of the decision. The duty of a railroad company to serve the public is too well established to require the citation of authority. The question before the court relates to the enforcement of that duty and it is immaterial whether or not the duty is imposed by statute or common law. The defendant in the case just cited attempted to escape the performance of its duty upon the ground that by doing so it would involve itself in a strike of its locomotive engineers and firemen, but it was held this was no defense to the proceeding. This case with other like authorities is cited and approved in Hutchinson on Carriers, Third Edition, Section 149.

The case of *Bluthenthal et al. v. Southern Ry. Co.*, 84 Fed. Rep. 920, is interesting in this connection. In that case certain liquor dealers in Georgia had been shipping their goods to points in South Carolina. On account of the dispensary law of South Carolina they were compelled to ship and sell their goods in original packages. After receiving shipments for some time

the railroad company notified the liquor dealers that they would thereafter decline to accept shipments of liquor not packed in cases, casks or kegs. An injunction *pendente lite* was issued enjoining the railroad company from refusing to receive and transport complainant's goods. Although the decision is short, it is to the point and is well supported by the authorities generally. There was no suggestion in that case that because the goods were to be delivered in South Carolina the Circuit Court for the Northern District of Georgia did not have jurisdiction to act. Indeed, in none of the numerous authorities on this question is there any intimation that the court having jurisdiction of the parties is without authority to act merely because the merchandise in question is to be delivered in another state.

The right to mandatory injunction in cases of this kind is asserted in Elliot on Railroads, Second Edition, Section 1564, and fully sustained by the numerous authorities there cited. That mandatory injunction is the proper remedy to compel a carrier to accept shipments of intoxicating liquors which it refuses because of void State legislation, is expressly decided in:

Danciger v. Wells-Fargo & Co., supra, and

Crescent Liquor Co. v. Platt, 148 Fed. Rep. 897.

The second proposition made by the appellant that the court below should have dissolved the temporary restraining order and dismissed the action naturally falls with the first and we do not conceive it necessary to give it any further attention.

It is insisted next, that even if the state court had jurisdiction there was no equity in the bill. As the authorities establish the proposition that a shipper may, by mandatory injunction, compel a carrier to accept and ship his goods, and as no authority is cited by appel-

lant in support of their contention of want of equity, we think this proposition might well be left without further argument. It is sought, however, to make the appellant's right to an injunction hinge upon the six shipments mentioned in the complaint to customers having unexpired licenses. That these persons had unexpired licenses is denied in the answer. At least, it is averred, that their licenses have long since expired. Well, suppose the plaintiff's right was confined to those six shipments and the court should say that under the record they did not have unexpired licenses. What then? Does this fact defeat the right which the plaintiff had to ship them beer? Certainly not. Whether they had licenses at all or whether they had expired or unexpired licenses cannot affect the fact that they had the right to buy and the plaintiff had the right to ship them beer. As to what they were to do with the beer after they got it is a matter that does not concern the present controversy at all. That was between them and the authorities of the State of Kentucky. The plaintiff's right to ship the beer was a matter between it and the carrier, and the only one upon which the court is called to pass.

The complaint avers very fully that it is the purpose of the appellant to refuse to ship any beer offered by the plaintiff to so-called local option districts in Kentucky, whether to persons having unexpired licenses or not, and that, unless restrained by the court, it will refuse to accept and ship all such shipments. The answer not only does not deny this allegation of the complaint, but expressly admits it and attempts to defeat it upon the ground that it had the right to refuse these shipments for the reasons therein stated. The averments of the complaint are as broad and full, we submit, as can be found in the complaint in any of the actions in which similar relief has been granted.

Furthermore, the answer further avers that the restraining order issued by the Vanderburgh Circuit Court commands the appellant to receive and ship intoxicating liquors to any and all points in the State of Kentucky and to any and all points in the prohibition districts and counties in the State of Kentucky set forth in the bill of complaint without regard to the question whwther consigned to persons having unexpired licenses or not.

It is next insisted, that appellant has the right to make a rule that it will not accept, transport or deliver intoxicating liquors consigned to points in Kentucky where the sale of such liquor is prohibited by law.

Before noticing the legal proposition involved in this contention it may be well to recall some of the averments of the appellant's answer.

It starts out by alleging that on March 21, 1906, the legislature of the State of Kentucky passed an Act, making it unlawful for any person or corporation to transfer, bring or deliver any intoxicating liquor into any local option county or district of the State of Kentucky, and imposing penalties. It is averred that all of the places mentioned in the complaint are such local option dictricts and that if appellant should receive from the appellee any intoxicating liquor and convey it to such points, it would render itself liable to prosecution by indictment in the State of Kentucky for violation of this statute. Realizing, evidently, the invalidity of this Act, it is further averred that upon its passage the appellant, in the exercise of its right as a common carrier, adopted the rule relied on, namely: that it would not convey intoxicating liquor to any such local option district.

The claim is further made, that, inasmuch as the appellant is chartered by the laws of the State of Kentucky and has accepted the provisions of the constitu-

tion and laws of that state, therefore, this Act, even if void, possesses as to it some additional force that requires its observance.

It is also pertinent at this point to note that the Court of Apeals of the State of Kentucky on the third day of October, 1907, or about six months after this answer was filed, held this Act unconstitutional and void.

Cincinnati N. O. & T. P. R. Co., v. Commonwealth, 104 S. W. Rep. 394.

In this case the railroad company was indicted for transporting a box of beer from Cincinnati, Ohio, to Danville, Kentucky, and there delivered to the consignee in direct violation of the statute. The case was aggravated by the further fact that the liquor was brought from Kentucky to Cincinnati by the consignor and there shipped to the consignee in Kentucky. The court held, however, that this could make no difference; that no inquiry could be made or heard as to the knowledge or motives of the carrier; that under the law it was compelled to receive the beer at Cincinnati and transport it to Danville upon payment of reasonable charges, statute or no statute.

The court cites with approval the following decisions of the Supreme Court of the United States, which are pertinent to the question involved:

Heyman v. Southern Railway Co., 203 U. S. 270.
Rhodes v. Iowa, 170 U. S., 412.
Lord v. Goodall, etc. Co., 102 U. S. 541.

These decisions of the Supreme Court deal with the question of the transportation of intoxicating liquor from one state to another, and all reach the same conclusion, namely: that such transportation is Interstate Commerce and entirely beyond the control of the states.

The Court of Appeals of Kentucky in holding the Act in question invalid was only reiterating the doctrine often affirmed by the Supreme Court. In the very teeth of these decisions, so to speak, the legislature of the State of Kentucky passed the Act which forms really the basis of the appellant's position in this case. That as to interstate shipments it must fall before the first court that passed upon it could not have been a question of any serious doubt. Notwithstanding this the appellant resolved that it would make the Act effective by a resolution of its own adoption. It therefore promulgated the circular set out in the record and which the court is asked seriously to say infused life into an Act of the legislature of the State of Kentucky, condemned not only by the Supreme Court of the United States, but by the Appellate Court of the State of Kentucky itself. Can anything more be required than a statement of this proposition to show its fallacy? Suppose the legislature of the State of Kentucky should pass an Act that hereafter it shall be unlawful for any common carrier or other person or corporation to bring into the State of Kentucky, or into any county or district thereof, contrary to a decision of the people thereof, any colored person. We apprehend no one would argue in favor of the validity of such an Act. Suppose further, that the L. & N. Railroad has a copy of the Act made and sends the same to its various agents and files the same also with the Interstate Commerce Commission, together with a statement that thereafter it will not transport to the State of Kentucky, or to any county or district where the same may be prohibited by a vote of the people, any colored person. It is brought into court by some colored person denied transportation and by way of answer sets up the Act of the legislature and the further fact, that being a corporation of the State of Kentucky and having solemnly agreed to abide by its constitution

and laws it is bound by the Act, and that, if perchance the Act should be held void, it has adopted a rule that, hereafter it will not transport or carry any colored person contrary to the provisions thereof. Would it be listened to seriously by any court? Is it possible to distinguish any difference in principle between the case put and that before the court? We submit that it is not. But yet, in support of this contention, counsel for appellant cite a long array of authorities holding in the main what no one disputes, that a common carrier need not necessarily be a public carrier of all classes of merchandise. It may, indeed, carry only passengers. If it has no facilities for the transportation of live stock, and by its charter is not required to carry the same, of course it cannot be compelled to do so. A street railroad company cannot be required to carry cattle. The so-called interurban electric roads doubtless could not be required so to do unless they held themselves out to the public to that effect. Neither a railroad company nor any other corporation is required to do anything that is impossible or destructive of its own rights or property. It is not necessary to go beyond the authorities cited by counsel for appellant to show that they have no tendency even to support the contention made. To illustrate, the following quotation from the 5th volume of the Encyclopedia of Law, on page 32 of appellant's brief, very clearly indicates the line of distinction that the carrier is entitled to make:

> "The duty to accept for carriage and to carry goods tendered is not an absolute duty on the part of the carrier, but is subject to reasonable limitations and conditions. A carrier is not a common carrier as to every character of goods, but only as to such as he professes to carry; he may, therefore, refuse to accept for transportation goods of a character which it is not his business or custom to carry, and which he does not hold himself out as willing or undertaking to carry."

And so on throughout all of the authorities cited on this point. It is impossible to read any of them without perceiving at a glance that they do not sustain the fourth proposition relied on by appellant.

Copious quotations are made from authorities dealing entirely with other and different cases. For instance, beginning on page 35 of the brief, is an extract of about one page from the opinion of Judge Rogers in the case of *Harp v. Choctaw etc. R. Co.*, 118 Fed. Rep. 169.

An examination of this case will at once show that it is not at all to the point. The railroad company in that case for a short time after its road was opened permitted the plaintiff Harp, who was operating a coal mine on or near one of its switches, to have cars on this switch and load the same out of wagons. The switch belonged to the railroad company and was one used for its beneral business at the point where located. The business of the road, and especially the shipments of coal, soon developed to such an extent that it declined to permit the plaintiff to continue to load coalin this way. There were other coal mines in the vicinity, but they had private switches constructed at the expense partly of the railroad company and partly of the mine owner. The evidence showed that at the time the company notified the plaintiff that he could no longer load cars by wagon, he and one of his witnesses were the only persons who were so doing along the line of the road. The action was brought by the plaintiff to recover damages sustained by him by reason of the refusal of the road to permit him to continue loading by wagon as he had been doing. To show the exact questions decided, we quote from the language of the court, at page 172:

"On this state of facts, two questions arise: First: Was the refusal of the railroad to furnish

cars to plaintiff on its commercial tracks in its yards at Hartford, to be loaded by wagons, while at the same time it furnished cars to other mine owners on their private tracks, to be loaded by tipple, such a discrimination against plaintiff as the law condemns? Second: If not, was the railroad company, under the facts stated, compelled by law to put in a switch for plaintiff's convenience at such place as he required, or at any other place?"

After reviewing a number of authorities as to the duties of railroad companies the court answers both these questions in the negative and in so doing uses the language quoted in appellant's brief.

> "Of course," say counsel for appellant in their brief, page 38, "the courts would never permit the carrier to hide behind a void statute by making the existence of such statute a mere excuse for discriminating against a particular commodity, individual or community, but where the carrier is seeking in perfect good faith to obey the mandate of the legislature, even though it has exceeded its power in attempting to regulate Interstate Commerce, the courts will be slow to say that the carrier has no right so to do."

We are tempted to remark, that while the courts might be slow they would be none the less sure to place upon such conduct the condemnation that it merits.

A considerable part of the brief for the appellant is devoted to a discussion of the evils wrought by intoxicating liquors, and a vivid picture is drawn of the Kentucky mountaineer filling himself with liquor and "shooting up the town." Quotations are made from the decisions of courts describing these evils, especially in certain localities that seem to be particularly subject thereto. These arguments would be perfectly proper if addressed to some authority competent to legislate

upon the subject. It is a matter of common knowledge that efforts have been made from time to time to induce congress to legislate on the subject, and we think perhaps a bill is now pending to prohibit the shipping of liquor from one state into local option districts of another. None of these things, however, can justify the court in saying that that is law which is not law. This court must deal with the law as it exists and as declared by the Supreme Court of the United States and the various Federal Courts that have spoken on the subject. We think we are justified in saying that the entire trend of appellant's argument is, that notwithstanding the law is against it, yet for some reason outside of it and, as appellant conceives, higher than the law, the court should refuse to enforce it. Even the question of local option and prohibition has two sides, else the people of this country would not, since the government was formed, have tolerated the use and sale of intoxicating liquors. To at least a part of appellant's argument the appellee might well retort, that if the man who fills himself with liquor and then "shoots up" the town would use more malt and less moonshine, the results would be far better not only for himself, but for the community. The truth of the matter is, that restrictive legislation of the kind attempted by the legislature of Kentucky usually has the effect of permitting to go unobserved the stronger drink, while excluding the more bulky and less harmful. To be sure, these are not questions pertinent to the issue before the court. In view, however, of the fact that several pages of appellant's brief are devoted to discussion of the evils of intoxicating liquors, we feel justified in saying that the appellee and those engaged in its line of business are not the ones who furnish the dynamite with which to "shoot up the town." The "bootleggers" and the "blind tigers" are not the customers of the breweries.

We are somewhat surprised at this language used by appellants in their brief at page 73:

> "The sale of liquor is primarily unlawful and it is only legalized by the possession of a state as well as a government license to sell." And further on,
>
> "The sale of liquor is not a constitutional right of the citizen, but it is a privilege for which a specific authority must be granted."

While it makes but very little difference so far as the questions involved in this case are concerned, nothing can be more misleading than these statements. In the absence of legislation we submit the citizen has exactly the same right to manufacture and sell wine and beer, or whiskey for that matter, that he has to raise and sell grapes, barley or corn. The restriction placed upon the manufacture and sale of intoxicating liquors are placed there by the legislature or other law-making power, not only of this, but in every country where such restrictions exist, so far as we are aware.

That the L. & N. for some reasons, into which we need not inquire, is trying to hide behind a void Act of the legislature of Kentucky, is too plain to require statement. This road runs through the counties of Henderson, Webster, Hopkins and Christian, in the State of Kentucky, the last named being along the Tennessee border. It asks the court to say that in the reasonable exercise of its powers as a common carrier it has the right to refuse all shipments of intoxicating liquors to the County of Henderson, but to receive those assigned to the County of Webster; that it may refuse all shipments consigned to points in Hopkins, and accept all consigned to points in Christian County, and so on through the entire state where its road runs, making an arbitrary selection of such counties as it will ship to and of such as it will refuse shipments to, based

solely on an Act of the legislature of the State of Kentucky, which it admits is void and of no effect.

But is it necessary to discuss these questions further? Practically every question raised by the appellant is settled in the cases of *Crescent Liquor Co. v. Platt*, 148 Fed. Rep. 894, and *Danciger, et al v. Wells-Fargo & Co.*, 154 Fed. Rep. 397, both of which have been noted briefly before. They are both cases in which the shipper had brought suit to enjoin the carriers from refusing to receive their goods on substantially the same grounds that are made the grounds of this suit.

It is true that in the Danciger case the court dissolved the temporary restraining order. This was upon the ground, however, that the complainants had no right to require the carrier not only to carry the goods, but to collect the price thereof. In other words, it held that the carrier was not obliged to accept C. O. D. shipments, a question upon which it is easy to see there is room, at least, for serious doubt. In both of these cases the right of the shipper to a mandatory injunction where the carrier refused to accept his goods is recognized to the fullest extent. In fact, this does not seem to have been seriously questioned. In these and other cases the refusal of the carrier was based upon some especial reason which it was claimed excused the carrier from the performance of its duty.

It should further be borne in mind, that the appellant admits in effect that it accepts and delivers beer to all places along its line other than local option districts. It cannot claim the virtue, therefore, of having adopted a rule that it will not carry intoxicating liquors at all and therefore does not bring itself within the reasoning of those decisions that concede to the carrier the right to determine within reasonable limitations what class of merchandise it will carry. Should the appellant adopt a general rule, that hereafter it will not carry intoxicat-

ing liquors at all, a somewhat different question will be presented. We venture the opinion, however, that even in a case of this kind the courts would say that the rule was unreasonable. A rule of this kind must be based upon some reasonable ground. Until a carrier could show why it should be permitted to refuse a case of bottles filled with beer, and at the same time accept one filled with mineral water or other liquid in exactly the same shape and form, it is submitted that the courts would not for a moment permit it to make any such arbitrary and unreasonable rule. However, this, like many of the questions argued by counsel for appellant in their brief, is not before the court.

The Court of Appeals of the State of Kentucky has, since this litigation was instituted, decided the main question involved adversely to the appellant, namely: that shipments of the kind involved in this suit constitute Interstate Commerce and are entirely beyond the control of the state. The case of *Commonwealth v. McKinney*, decided November 17, 1910, 131 S. W., 497, involved the delivery in the State of Kentucky of intoxicating liquor to a minor who had ordered the same from the dealer in the State of Indiana. The delivery to the minor was in direct contravention of the terms of the statute. The court, however, following the decision of this court in *Adams Express Co. v. Commonwealth of Kentucky*, 214 U. S. 218, 53 L. Ed., 972, held its own statute absolutely void as applied to the shipment in question.

The same result was reached by the same court in a later case decided January 24, 1911, *Commonwealth of Kentucky v. Scott*, 133 S. W. 766.

Not only is the control of all interstate shipments vested in Congress, but no state may make any law limiting the right of a citizen of one state to purchase any article of commerce in any other state and to have

the same shipped to him wherever he may be without regard to the laws of any state.

State v. Wignall, 128 N. W. 935.

Notwithstanding all that counsel say as to the evil effects of intoxicating liquors, it seems unnecessary to cite further authorities or to adduce further argument in support of the proposition that beer is recognized as an article of Interstate Commerce and is entitled to the protection of the law to the same extent and under the same conditions as other commodities.

There has been no modification of the rule on this subject announced in the cases above referred to and the decisions of the Federal Courts, wherever the subject has come before them, reiterate the same.

Danciger et al v. Stone, 188 Fed. Rep. 510.
Danciger et al v. Stone, 187 Fed. Rep. 823.
Barrett v. City of New York, 183 Fed. Rep. 793.

Counsel for appellant have cited numerous authorities, a very considerable number of which we have not felt it necessary to notice for the reason that they decide questions that are not involved in this appeal. The most casual reference to these authorities will, we think, make this apparent, and we do not feel disposed, therefore, to lengthen our brief by analyzing each in detail. Upon the question as to whether or not the Vanderburgh Circuit Court had jurisdiction of the subject matter of the action, we beg to suggest that the authorities cited by counsel for appellant decide the exact question against their contention. Not a single authority is cited in support of the proposition that the statute of the State of Kentucky which really forms the basis of the defendant's case possesses any force or validity as applied to Interstate Commerce. It is not denied, in fact it is insisted by appellant in arguing the question of jurisdiction, that the shipments of beer in-

volved in this controversy constitute interstate commerce. Not only this court, but the Court of Appeals of the State of Kentucky have expressly held, that as applied to interstate commerce, the statute relied on is absolutely void. The attempt of the appellant to infuse life into this statute by the adoption of any rule or regulation of its own is so manifestly futile that it falls of its own weight. Against this array of authorities counsel for appellant address a most able argument upon the subject of the evil effects of strong drink, which as we have above observed would be entirely appropriate if addressed to the legislative power of the government or to the voters of a community on the subject of local option. To ask this court, however, to overrule its previous numerous decisions on this subject for the reasons urged is to ask the court to give effect to the opinion of counsel as to what the law ought to be rather than to declare what it is.

In closing, we quote the following language of the court in the case of *Crescent Liquor Co. v. Platt, supra:*

> "With the business carried on by complainants, it is not the duty of this court to inquire, other than to determine that it is lawfully conducted, and such I find it to be. It is an avocation provided for and protected by law, one recognized by the statutes of the State of West Virginia, as well as by the laws of the United States. It is not the duty of the judiciary to philosophize concerning the moral questions involved in this business, for that under our system of laws devolves upon another branch of our government."

The appellee submits, therefore, first, that an appeal does not lie in this case; and second, that the judgment of the court below was correct and should be affirmed.

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